



## United States Department of the Interior

### OFFICE OF THE SOLICITOR

Office of the Field Solicitor  
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BIA.TC.11186

August 16, 2001

Mr. Larry Morrin  
Regional Director  
Midwest Regional Office  
Bureau of Indian Affairs  
Bishop Henry Whipple Federal Building  
1 Federal Drive  
Ft. Snelling, Minnesota 55111

Attn: Environmental Services - Herb Nelson

Re: Mille Lacs Waste Water Treatment Facility - Petitions for Review

Dear Mr. Morrin:

By memorandum received in this office July 27, 2001, you requested our assistance in clarifying the continued existence of the Mille Lacs Indian Reservation in Minnesota. Copies of petitions challenging U.S. Environmental Protection Agency (USEPA), Region V's determination to issue the National Pollution Discharge Elimination System permit for the Mille Lacs Waste Water Treatment Facility raise issues as to whether the Mille Lacs Indian Reservation (the Reservation) and its boundaries as established in the Treaty of 1855 continue to exist, undiminished.

Most of the petitioners who oppose USEPA issuance of the permit argue that the Minnesota Pollution Control Agency (MPCA) would be the more appropriate permitting authority based on their assertions that the Mille Lacs Indian Reservation, occupied by the Mille Lacs Band of Ojibwe, no longer exists. Although this office has responded to inquiries from members of the public as well as previously having provided a detailed opinion on this issue<sup>1</sup>, the misconceptions and arguments from individuals and groups who have concerns about the existence of the Reservation persist. The fundamental source of these continuing claims may be confusion over the distinctions between *Indian title* and *reservation boundaries*.

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<sup>1</sup> An opinion dated February 28, 1991, signed by Mark A. Anderson, provides the most detailed discussion outlining the history and legal analyses upon which he concludes that the Reservation, encompassing lands within the original boundaries established in the Treaty of 1855, continues to exist, despite attempts to relocate members of Mille Lacs and other Minnesota Chippewa Bands through the Nelson Act (Jan. 14, 1889, 25 Stat. 642).

From the materials submitted with the petitions arguing that MPCA rather than USEPA should be the permitting authority, it appears that those petitioners who claim disestablishment of the Reservation principally rely on two sources of authority: 1) *United States v. Mille Lacs Band*, 229 U.S. 498 (1913) (hereinafter referred to as the "1913 decision"), a decision of the U.S. Supreme Court on appeal of a Court of Claims award of damages for lands on the Reservation which had been conveyed under general land laws rather than specific statutes relating to conveyance of Indian lands; and 2) a letter dated May 2, 2000, from George Garklavs, District Chief, Mounds View, MN, U.S. Geological Survey (USGS) (hereinafter referred to as the "USGS letter"), relating to use of the 1855 Treaty Reservation boundaries for reference in a water resources report issued by USGS.

Reliance on either of these sources for the proposition that the Reservation no longer exists is misplaced, though for different reasons. First,

petitioners' reliance on the 1913 decision in this instance is misplaced because the 1913 decision deals with compensation for conveyance of title to Indian lands, but does not rule on the issue of the continued existence of the Reservation with its original boundaries, because it was unnecessary for it to do so to decide the case. The judicial standards for finding disestablishment or diminishment of a reservation require clear expression of Congressional intent, and the 1913 decision does not analyze or discuss Congressional intent with respect to the Reservation boundaries. Thus, the 1913 decision was not referenced in the detailed opinion provided by this office in 1991<sup>2</sup> because it did not address the question of the Reservation's boundaries but rather the disposition of Indian lands on the Reservation. Moreover, as noted in our 1991 opinion, subsequent to the 1913 decision, by the Act of August 1, 1914, Congress specifically appropriated funds for acquiring lands to be allotted to Mille Lacs Indians who had remained on the Reservation. Funding to purchase lands for allotments to Mille Lacs members in 1914, made necessary by previous conveyances of title to Reservation lands, indicates that Congress considered the Reservation to continue to exist. If Congress had considered the Reservation to have been disestablished, it presumably would not have provided funding for allotments for Mille Lacs Indians on the original Reservation.

Second, reliance on the USGS letter also is misplaced because it does not purport to state Departmental policy with respect to the boundaries of the Reservation<sup>3</sup>, but instead attempts to clarify its use of the Reservation boundaries for reference. Further, the USGS letter is not competent authority for the petitioners' proposition that the Reservation has been disestablished, because determinations as to the continued existence or boundaries of an Indian reservation are not within the responsibility or expertise of the USGS. The mission of the USGS within the Department of the Interior includes responsibilities to manage water, biological, energy, and mineral resources. Accordingly, even assuming that the USGS letter actually took the position

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<sup>2</sup> See footnote #1. above.

<sup>3</sup> The letter, copies of which are attached to several of the petitions, suggests that future similar questions be addressed to the Solicitor's Office.

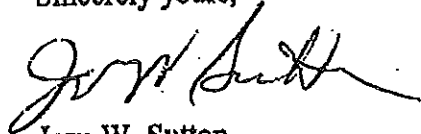
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asserted by the petitioners, the USGS's role in the Department is scientific and technical, not legal, and any misstatements or conclusions it contains are not dispositive. Issues involving the existence or location of Indian Reservation boundaries are within the purview of the Bureau of Indian Affairs and the Office of the Solicitor rather than USGS.

Individuals and organizations, such as the petitioners, periodically approach this or other government offices to argue that the Reservation no longer exists based on the Nelson Act (Jan. 14, 1889, 25 Stat. 642) and other case law, in addition to the 1913 decision and the USGS letter discussed herein. For example, one of the petitioners asserts that a 1998 decision of the Supreme Court involving taxation of tribally owned fee land on the Leech Lake Indian Reservation<sup>4</sup> is authority for their claim that the Mille Lacs Reservation was disestablished by the Nelson Act. More detailed discussion of issues raised as to the effect of on the status of the Mille Lacs and four other Chippewa Indian reservations in Minnesota is set out in the 1991 opinion of this office, and summarized in our letter dated November 5, 1998 addressed to Dr. R.D. Courteau. As we noted in our letter to Dr. Courteau, the 1998 Leech Lake decision explicitly acknowledged the continued existence of the Leech Lake Reservation<sup>5</sup>.

For the reasons outlined above, we again conclude that the boundaries for the Mille Lacs Indian Reservation established in the Treaty of 1855 remain intact, undiminished by the Nelson Act as interpreted by federal courts. We hope this clarifies the issues raised as in the petitions challenging USEPA permitting authority. Please feel free to contact this office should there be further assistance we can provide.

Sincerely yours,



Jean W. Sutton  
For the Field Solicitor

cc: USEPA, Region V, Acting Regional Counsel, Bertram C. Frey, Attn: Barbara Wester  
USGS, George Garklavs, Director (Mounds View, MN)

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<sup>4</sup> *Cass County v. Leech Lake Band*, 119 S.Ct. 1904 (1998)

<sup>5</sup> *Cass County v. Leech Lake Band*, *id.* Other judicial decisions have recognized the continued existence of reservation boundaries for the five Chippewa bands which the Nelson Act had designated for removal to White Earth. For example, subsequent to the *Cass County v. Leech Lake Band* decision, a recent federal district court decision reaches conclusions which explain the Nelson Act and clearly recognize the continued existence of the Grand Portage Reservation (*See, Melby et al. v. Grand Portage Band of Chippewa et al.*, U.S.D.C. D. MN, unpublished, August 13, 1998).

